Supreme Court, U.S.
FILED
JUL 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-5454

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

---

DAVID RANDOLPH GRAY
Petitioner

vs.

STATE OF MISSISSIPPI
Respondent

---

**On Writ of Certiorari To The Supreme Court of the State of Mississippi**

---

# BRIEF FOR RESPONDENT

---

**EDWIN LLOYD PITTMAN**
**ATTORNEY GENERAL**
**STATE OF MISSISSIPPI**

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
Counsel of Record

AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

Attorneys for Respondent

## QUESTION PRESENTED

1. WHETHER IT WAS ERROR FOR THE MISSISSIPPI SUPREME COURT TO AFFIRM PETITIONER'S SENTENCE OF DEATH BY HOLDING THAT THE EXCUSAL OF A JUROR WAS HARMLESS.

## TABLE OF CONTENTS


| | Page: |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Authorities | iii-vi |
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Constitutional Provisions and Statutes Involved | 1 |
| Statement of the Case | 2 - 3 |
| Statement of the Facts | 3 - 9 |
| Summary of the Argument | 9 - 10 |
| Argument and Authority | 10 - 38 |
| Conclusion | 38 |
| Certificate of Service | 39 |




## TABLE OF AUTHORITIES


| | Page |
|---|---|
| Adams v.Texas, 448 U. S. 38, 45, n. 3 (1980) | 25,26 |
| Allegrezza v. State, 240 Miss. 382, 120 So.2d 780 (Miss. 1960) | 27 |
| Barclay v. Florida, 463 U.S. 939 (1983) | 37 |
| Batson v. Kentucky, 476 U.S. __, 90 L.Ed.2d 69, 106 S.Ct. ___ (1986) | 32 |
| Billiot v. State, 454 So.2d 445 (Miss. 1984) cert. den. ___ U.S. ___, 84 L.Ed.2d 369, reh. den. 85 L.Ed.2d 154 (1985) | 27 |
| Cabello v. State, 471 So.2d 332 (Miss.1985) | 27 |
| Capler v. City of Greenville, 207 So.2d 339 (Miss. 1968), cert. den. 392 U.S. 941 (1969) | 27 |
| Chapman v. California, 386 U. S. 18 (1967) | 29 |
| Darden v. Wainwright, ___ U.S. ___, 54 U.S.L.W. 4734, 4736-37 (June 23, 1986) | 23 |
| Davis v. Georgia, 429 U.S. 122 (1976) | 10,11,25 28,34 |

## TABLE OF AUTHORITIES CONTINUED


| | Page |
|---|---|
| Delaware v. Van Arsdall, 475 U.S. __, 89 L.Ed.2d 674, 106 S.Ct. ___ (1986) | 10,29 |
| Fuller v. State, 468 So.2d 68 (Miss. 1985) | 26 |
| Gideon v. Wainwright, 372 U.S. 335 (1963) | 31 |
| Gilliard v. State, 428 So.2d 576 (Miss. 1983) | 27 |
| Grijalva v. State, 614 S.W.2d 420 (Tex Cr. App. 1981) | 25 |
| Gray v. State, 472 So.2d 409 (Miss. 1985) | 1,3 |
| Harris v. State, 125 So. 253 (Miss. 1929) | 26 |
| Jackson v. State, 337 So.2d 1242 (Miss. 1976) | 2 |
| Johnson v.State, 340 So.2d 738 (Miss. 1976) | 27 |
| Lockhart v. McCree, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) | 32,37 |
| Moore v. Estelle, 670 F. 2d 56 (5th Cir. 1982) | 25 |




## TABLE OF AUTHORITIES CONTINUED


| | Page |
|---|---|
| Payne v. Arkansas, 356 U.S. 560 (1958) | 31 |
| Peters v. State, 314 So.2d 724 (Miss. 1975) | 26 |
| Pruett v. State, 431 So.2d 1101 (Miss.1983), cert den. 464 U.S. 865 (Miss. 1984) | 27,28 |
| Ramseur v. State, 368 So.2d 842 (Miss. 1979) | 27 |
| Reynolds v. United States, 98 U.S. 145 (1878) | 17 |
| Rose v. Clark, ___ U.S. ___, 46 CCH S.Ct Bull. P. B4382 (July 2, 1986) | 9,28,29 31,33 |
| Seals v. State, 208 Miss. 236, 44 So.2d 61 (1950) | 27 |
| Sullivan v. State, 155 Miss. 629, 125 115 So. 115 (1929) | 26,27 |
| Tumey v. Ohio, 273 U.S. 510 (1927) | 31 |
| United States v. Hastings, 461 U.S. 499 (1983) | 33,37 |
| United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) | 31 |
| Vasquez v. Hillery, 474 U.S. ___, 106 S.Ct.617, 88 L.Ed.2d 598 (1986) | 31 |

## TABLE OF AUTHORITIES CONTINUED


| | Page |
|---|---|
| Wainwright v. Witt, 469 U.S. ___, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985) | 9,10,11, 15,22,23 26,35 |
| Witherspoon v. Illinois, 391 U.S. 510 (1968) | 10,11,15 16,20,26 28,29,32 33,38 |




## BRIEF FOR THE RESPONDENT

### I. OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as Gray v. State, 472 So.2d 409 (Miss. 1985), and is set out as Appendix A to the Petition for a Writ of Certiorari in this case.

### II. JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. § 1257 (3) challenging the constitutionality of his sentence of death.

### III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner has adequately identified the pertinent constitutional provisions and statutes involved.

## IV. STATEMENT OF THE CASE

Petitioner, David Gray, was indicted for the crime of capital murder and as being an habitual offender by the Grand Jury of the Circuit Court of Harrison County, Mississippi, First Judicial District during the June 1982 Term of said court. Petitioner's bifurcated trial was conducted according to the dictates of Miss. Code Ann. §99-19-101 et seq (Supp. 1977) and Jackson v. State, 337 So.2d 1242 (Miss. 1976). After hearing all the evidence during the guilt phase and deliberating thereon the jury returned a verdict of guilty of capital murder. Thereupon the sentencing hearing was conducted before the jury. After hearing the evidence adduced in aggravation and mitigation of sentence the jury retired and considered their verdict. After due consideration the jury returned a sentence of death.



On automatic appeal to the Mississippi Supreme Court the conviction and sentence were affirmed on June 5, 1985. Gray v. State, 472 So.2d 409 (Miss. 1985). A petition for rehearing was denied on July 24, 1985. From this decision petitioner filed his petition for writ of certiorari to the Mississippi Supreme Court. This petition was granted on February 24, 1986.

## V. STATEMENT OF THE FACTS

On the evening of June 2, 1982 David Gray met Attina Marie Cannaday, his friend of approximately a month, in the Red Garter Lounge in Biloxi, Mississippi. Gray and Cannaday both met, for the first time, Dawn Bushart. They only knew her as the "fat girl". The trio drank and danced for most evening. Sometime during the evening Cannaday asked Gray if he would do his "sister" a favor. The favor was to beat or rough up her former "old man" who

"done her wrong." Cannaday then mentioned killing the former boy friend, Ronald Wojcik, and Gray balked. The subject of killing was dropped for the time and the trio left for Wojcik's apartment. Gray's car was not operating so the group set out on foot after first stopping by the car to pick up four knives. Cannaday wanted a gun to scare Wojcik, but the only weapons Gray could furnish were the knives.

After having traveled on foot for a distance Cannaday became tired of walking and turned to the oncoming traffic, pulled her shirt up exposing her breast. The display had the desired effect and the three were soon riding to their destination in the company of two men. When they arrived at the Beachview Apartments, Wojcik's home, the knives were distributed. Cannaday opened the front door with a key she had retained when Wojcik threw her out after discovering out she was only



sixteen years old. Gray and Cannaday entered the apartment, leaving Bushart on the porch to keep watch.

Cannaday went into the bedroom, turned on the light and began screaming at Wojcik and his new girlfriend, Sandra Sowash. Cannaday ordered Wojcik out of the bedroom at knife point and Gray went into the bedroom to guard Sowash. Gray told Sowash that he was Cannaday's "brother" and that Wojcik, the "m----- f----- hurt her and now he's gonna be hurt." Sowash began crying and Gray told her that she was not going to get hurt if she did not do anything wrong. All this time Cannaday and Wojcik were arguing in the living room. Cannaday brought Wojcik back into the bedroom and began ransacking the apartment looking for Wojcik's gun. She began throwing things about, breaking a mirror and other items, but never finding the gun because she covered it up in her mad search.

Gray and Cannaday ordered Wojcik and Sowash out of the apartment to where Bushart was waiting. Wojcik and Sowash were then ordered into Wojcik's van at knife point, leaving Wojcik's two children asleep in the apartment.

The fatal journey began with Cannaday driving, Gray in the passenger seat and the other three in the rear of the van. Cannaday heard Wojcik and Sowash talking, fearful of an escape attempt she told Gray to switch places with Wojcik. Cannaday almost overturned the van while going around a curve because she was driving at such an excessive rate of speed. Wojcik asked Cannaday to slow down only to be told not to tell her how to drive. Cannaday increased her speed. At one point Cannaday attempted to beat a train at a crossing only to have a collision avoided when Wojcik grabbed the sterring wheel swerving the van out of



harms way. In response to this action by Wojcik, Gray told Bushart to "cut him" if he moved again.

Gray then began making sexual advances toward Sowash. Gray told Sowash to take her clothes off or he would cut them off, Sowash complied. Encouraged by Cannaday and Bushart, he raped Sowash while everyone watched.

Cannaday drove them to a wooded area on Lampkin Road, just off Three Rivers Road in rural Harrison County, Mississippi. Gray got out of the van and ordered Wojcik and Sowash out. Bushart told Sowash that she should "say goodbye to [Wojcik] 'cause this is the last time you'll see him alive." Wojcik began trying to talk Gray and company out of harming he and Sowash. In response Gray grabbed Wojcik by the arm and said, "come on, m----- f-----, let's go." Wojcik was forced by Gray at knife point into the woods. Sowash then tried reasoning with Cannaday, pleading for their

lives. Cannaday told her "that's too bad cause he's going to get killed." Cannaday began yelling to Gray, "kill him, kill him now." Gray yelled back, "bring the bitch out here now." Sowash broke away from Cannaday and ran. Cannaday threw a knife stricking her in the back, but not harming her. She ran to a nearby house seeking help. When no one answered the door she hid under a wagon.

Cannaday went out into the woods to help Gray finish killing Wojcik. She cut his throat and attempted to remove his head for a keepsake.

Gray and Cannaday got back in the van with Bushart they made a brief search of the area for Sowash but did not locate her. The trio fled the area. On the way to Slidell, Louisiana Bushart asked to be let out of the van. Gray and Cannaday continued on to Slidell. Gray was arrested, driving Wojcik's van around noon on June 3, 1982 in Slidell.



The pants Gray was wearing when arrested had type "B" blood on the right leg, the same type as Wojcik's.

## VI. SUMMARY OF THE ARGUMENT

The ruling of the Mississippi Supreme Court, while reaching the correct result, misapplied Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), in not giving due deference to the trial courts finding that Juror Bounds was excusable for cause for being totally indecisive. Even if the court below was correct in its application of Witt, the Mississippi Supreme Court properly held that the trial judge was allowed to correct errors he made during the voir dire examination prior to petitioner's trial and in that there was no prejudice to the petitioner.

The recent rulings of this court in Rose v. Clark, ___ U.S.___, 46 CCH S.Ct. Bull P.

B4382 (July 2, 1986), Delaware v. Van Arsdall, 475 U.S.___, 89 L.Ed.2d 674, 106 S.Ct. ___ (1986) and Wainwright v. Witt, supra, show that there is no reason to continue to interpret Davis v. Georgia, 429 U.S. 122 (1976), as creating a per se rule inquiring reversal when there is an error in jury selection concerning death qualification. This Court has held that there is "nothing talismanic about juror exclusion under Witherspoon merely because it involves capital sentencing juries." This being the case there is no reason that a harmless error analysis could not be employed in cases concerning jury selection in this case.

## VII. ARGUMENT AND AUTHORITY

**IT WAS NOT ERROR FOR THE MISSISSIPPI SUPREME COURT TO AFFIRM PETITIONER'S SENTENCE OF DEATH BY HOLDING THAT THE EXCUSAL OF A JUROR WAS HARMLESS.**



**A. THE COURT BELOW WAS PROPER IN UPHOLDING THE TRIAL COURT'S CORRECTION OF ITS OWN ERRORS IN VOIR DIRE.**

This case, if nothing else, is the prime exemplar of what Wainwright v. Witt, 469 U.S. ___, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985), was meant to correct. The requirement by Witherspoon v. Illinois, 391 U.S.510 (1968), of "unequivocal" answers, "automatic" decision making and"unmistakable clarity" to questions concerning conscientious scruples against the death penalty clearly created the "mess" that appears of record in this case.

Petitioner would have this Court determine the issue without reconsidering its per curium ruling in Davis v. Georgia, 429 U.S. 122 (1976). To achieve this end petitioner asks the Court to pay deference to the finding of the trial court "who was present to observe the demeanor of the jurors and the tenor of their responses." Brief at 11. He then relies, however, on the incorrect interpretation of the

trial courts ruling by Mississippi Supreme Court. The language in the state court opinion relied on by petitioner is as follows:

> When the voir dire began several jurors expressed the sentiment that they had conscientious scruples against the death penalty and could not vote to inflict it under any circumstances The trial judge refused to excuse those jurors for cause and required the state to exercise peremptory challenges to them. It is abundantly clear from the record that his reason for doing so is because he believed that the jurors were simply claiming to have conscientious scruples against the death penalty so that they could be released from jury service. [Footnote omitted]
>
> [Emphasis added] 472 So.2d at 421.

The record does not reflect this to be the reason for making the State use peremptory challenges to excuse these jurors. In fact the trial judge states there was only one juror that fell into that category. Respondents invite the Courts attention to the words of the transcript, which reads as follows:

> BY MR. NECAISE: Well, all I can do, Judge is go by what,by what the lady says. The Court's put, the Court has put the State in a precarious position by making us use our challenges when we clearly met the law in about six cases. On about six challenges that the Court has made us use . . .
>
> BY THE COURT: (Interposing) Well, I think I had one or two that . . .
>
> BY MR. NECAISE: (Interposing) I agree with you, Judge. There's two of them . . .
>
> BY THE COURT: . . . just used that to get off of the Jury. At least one person that I'm positive of.
>
> BY MR. NECAISE: Well, I'm sorry that they did that, Judge.
>
> [Emphasis added] Tr. Vol. IV, p. 540-41; App. at 20.

This excerpt from the transcript makes it abundantly clear that the reason for excusal ascribed by the Mississippi Supreme Court to the trial court was not in actuality the reason he refused to excuse the five jurors for cause. In fact when we look to the questioning of Juror Pannell we find the juror to which the trial court was referring. App. 15-16. Further we find the trial court recognizing its

error when confronted with Juror Bound's equivocation. The transcript reads:

> BY MR. NECAISE: The State had exhausted their peremptory challenges, their twelve peremptory challenges. And, of course, the State would not, the Court would not allow the State to excuse anybody who had conscientious scruples against Capital Punishment under any circumstances and would vote against the Death Penalty under any circumstances on five different Jurors, which we can give the Court their names, and the Court MADE us use our challenges. And now we get one where she has said one time yes and one time no. And there's just no question about it that if we had another challenge, we would use it on this lady because as the Court can see she is very weak and indecisive about the question. And I ask the Court, because the Court has not followed this case, throughout the case, that you let us have another challenge in this case, in particular, on this woman and we can give you the ones on Ruiz, uh, Coker, uh, Arlean Walker, Annie Mae Bush, uh, Lassabe, Price and, uh, who were very unequivocal, that they would not under any circumstances, would not vote to impose the Death penalty.
>
> BY THE COURT: Well, I think that's right, I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many.



> BY MR. NECAISE: I didn't either, Judge.
>
> [Emphasis added] Tr. Vol. IV, p 545-47, App. 22-23.

It is clear that the trial judge was attempting to insulate the trial against Witherspoon error by forcing the state to use their peremptory challenges instead of challenges for cause.

If we are going to rely on the rulings of the trial court, as petitioner urges, we must do just that and not cite to the interpretation given to those rulings by a reviewing court. Petitioner's argument attempts just such a slight of hand.

With this in mind respondent's contend that the Mississippi Supreme Court, while ultimately reaching the correct result, misapplied this Court's ruling in Wainwright v. Witt, 469 U.S. ___ , 105 S. Ct. 844, 83 L.Ed.2d 841 (1985), by refusing to pay the deference due the trial court's finding that

juror Bounds was not qualified to sit as a juror. This Court stated in Witt:

> We therefore take this opportunity to clarify our decision in Witherspoon, and reaffirm the above-quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. The standard is whether the Juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."[5] We note that, in addition to dispensing with Witherspoon's reference to "automatic" decision making this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and answer sessions which obtain results in the matter of a catechism. What common sense should have realized experience has proved: Many venireman simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these venireman may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.[6] Despite the lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to apply the law. For



> reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.
>
> [Emphasis added] 83 L.Ed.2d at 851-53.

No deference was paid to the findings of the trial judge who saw and heard this juror. This court has held that this deference should be granted even on direct review. Reynolds v. United States, 98 U.S. 145 (1878). The trial court held, after hearing the juror being questioned by the State and questioning her himself, that:

> BY THE COURT: (Interposing) I should have questioned them on this, I guess . . . but I never had no idea it was going to . . . wind up in a mess like this. I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.
>
> Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right there was eight of them that had said that they were against Capital Punishment.

And I think there was, uh, five of those that were unequivocally opposed to it and answered, in substance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point allow him to challenge this lady for cause. She is totally indecisive. I think she is totally indecisive. She says one thing one time and one thing another.

The Court is of the opinion that it cheated the State by making him, uh, use, uh by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case.

BY MR. STEGALL: Excuse her for cause?

BY THE COURT: I'm going to excuse her.

BY MR. STEGALL: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record. . .

BY THE COURT: (Interposing) I'm not going to add any to his challenges.

BY MR. STEGALL: Okay. All right. [sic]

BY THE COURT: I'm not going to go back and give him five more. I'm going to excuse her for cause.
[Emphasis added] Tr. Vol. IV, p. 553-55; App. 25-26.



If the reason the trial court was not allowing peremptory strikes against jurors expressing scruples against the death penalty was that he did not believe they were sincere, then why did he hold that he had "cheated" the State by making it use its peremptory challenges. Further it is clear from the above quoted passage that the trial court was using the word cause when he meant to be using the word peremptory in reference to challenges used by the State. We submit that this is what happened a few lines later in the transcript when he stated that he was going to excuse Juror Bounds for cause.

Contrary to the assertions of petitioner, the record in this case clearly shows that the trial court forced the State to use peremptory challenges against at least five jurors who unequivocally stated that they could not or would not impose the death sentence under any circumstance. The trial court admits this in

his ruling when he stated that he "cheated" the state. App. at 26. Even under a strict interpretation of the ruling in Witherspoon v. Illinois, 391 U.S. 510 (1968), each of these five jurors met the standards to be excused for cause by the State. Juror Ruiz stated that he could not vote to impose the death penalty in this case or any other regardless of what the law was. When the State moved to strike Ruiz for cause the trial court overruled the motion. The State had to use a peremptory challenge in order to remove Ruiz from the jury. The State took exception to this ruling. App. at 3-4. Next Juror Coker stated flatly that she did not believe in the death penalty and would not vote for the death penalty in any case. When the state moved to strike Mrs. Coker for cause the trial court stated, "I'll require you to use one of your challenges." App. 5-6. Juror Bush stated that she would not vote for a death sentence under



any circumstance because she did not believe in the death penalty. The State moved to strike her for cause "because of her conscientious scruples against Capital Punishment." The trial court overruled the motion and excused her using a State peremptory challenge, App. 6-9. Prospective juror Mary Price stated that she did not believe in the death penalty and did not think it should be imposed in any type of case. She stated further that she "could not take it upon [her]self to vote the Death Penalty for anybody." The State asked that she be excused for cause. The trial court refused. App. 10-12. Juror Walker stated that she did not have any objection to the death penalty, but that she could not vote for it. She stated that it would be alright for some one else to vote to impose such a sentence but that she never could no matter what the evidence or the type of case. Again the State moved to strike this juror for cause. The

trial court stated, "I'll overrule you again and let you use your peremptory." The State then excepted stating, "Judge, let me ask that the record state that in all of these I am taking exception to the court's ruling." App. 12-13. There were three other jurors that claimed conscientious scruples against the death penalty. Clearly Juror Pannell was using her supposed opposition as an excuse to get out of jury duty. App. 15-16. Jurors Easton and Lassabe were clear cases of equivocation by the jurors. App. 4-5, 13-15.

Finally we come to Mrs. Bounds. Mrs. Bounds was found by the trial court to be a juror who "can't make up her mind" and as being "totally indecisive." This ruling of the trial court was not given the deference that it was due by the court below. Here we have just the situation that Witt, spoke of, "[d]ispite the lack of clarity in the printed record" it is clear that the trial judge was left with the



definite impression that Juror Bounds" would be unable to faithfully and impartially apply the law." 83 L.Ed.2d at 852. Juror Bounds was properly excused under Witt. The decision in Darden v. Wainwright, _____ U.S. _____, 54 U.S.L.W. 4734, 4736-37 (June 23, 1986), fully supports this position.

**B. THE APPLICATION OF A HARMLESS ERROR STANDARD TO THE EXCUSAL OF THE JURORS IN CAPITAL CASES IS NOT IMPROPER.**

Even if we assume the Mississippi Supreme Court has not misapplied the ruling in Witt, by not giving due deference to the findings of the trial court, the result it reached and the basis of the decision is correct. As the court below held in its opinion:

> Although the route taken to Mrs. Bounds' dismissal was a circuitous one indeed, and most highly disfavored, it should be obvious to all that no prejudice occurred to the defendant Gray. The force and effect of the trial court's ruling was to correct an error he had committed in refusing to dismiss other jurors for cause after

they had unequivocably stated that they could not vote to impose the death penalty in any circumstance. Certainly the state is entitled to a jury that can follow the instructions and juror's oath. Adams, supra; Witt, supra. That being the case the trial court was correct when it recognized the error in its prior rulings and took affirmative action to correct that error. We have recognized in numerous cases that a trial court should be afforded the opportunity to correct any errors at trial by way of a motion for new trial. House v. State, 445 So.2d 815, 819 (Miss.1984); Read v. State, 430 So.2d 832, 838 (Miss. 1983); Johnson v. State, 404 so.2d 553, 556 (Miss. 1981); Tribbett v.State, 394 So.2d 878, 880-81 (Miss. 1981).

> There is no logical reason not to allow the trial court in this situation to correct its erroneous ruling prior to the empanelling of the jury and termination of trial. Notions of judicial economy make it clear that the trial court should be allowed to recognize and correct its error early in the proceedings, especially where as here, there could have been no possible prejudice to the defendant. That being the case, we find no merit to Gray's final assignment of error.

[Emphasis added] 472 So.2d at 422-23.

What the Mississippi Supreme Court conducted was in effect a harmless error analysis of the situation presented here. The



case at bar is factually different than that presented in Davis v. Georgia, 429 U.S. 122 (1976) and probably falls into the category of cases left open in Adams v. Texas, 448 U. S. 38, 45, n. 3 (1980). Petitioner citing Moore v. Estelle, 670 F. 2d 56 (5th Cir. 1982) and Grijalva v. State, 614 S.W.2d 420 (Tex Cr. App. 1981), attempts to cast this case in the the mold of the cases where the State had peremptory challenges left at the conclusion of voir dire and attempted to use them in an ex post facto fashion on appeal to cure challenges for cause found to be erroneous. This is not a case where the State is attempting to exercise peremptory challenges on appeal that it did not use at trial. The State did not "save a few challenges to be exercised after everyone has gone home" Here the State was forced to exhaust its challenges. In doing so it was forced to useits peremptory challenges on five jurors clearly excludable under whatever standard of

exclusion one wishes to impose upon this case, Witherspoon, Adams or Witt. The trial court recognized its error and corrected this by changing its ruling on an earlier strike and allowing the State to challenge the "totally indecisive" juror. This was done "in a give and take fashion with the defense" at trial and not later at the appellant level. It was totally proper in this case to use a harmless error analysis of the facts leading to the excusal of Juror Bounds.

Mississippi has long used a harmless error approach to matters involving jury selection. While the jury selection process in Mississippi is governed by Miss. Code Ann. §§ 13-5-1 to 13-5-95 (1972), the court below has held that failure to follow statutory procedures was not reversible per se. Harris v. State, 125 So. 253 (Miss. 1929); See also Fuller v. State,468 So.2d 68 (Miss. 1985); Peters v. State, 314 So.2d 724 (Miss. 1975); Sullivan v. State, 155



Miss. 629, 125 115 So. 115 (1929). This harmless error or no-prejudice standard has also been applied to cases dealing with claimed prejudice on the part of a juror, cases in which an excusal or failure to excuse for cause was rendered harmless because peremptory challenges remained, and even cases involving jury selection in death penalty cases. See: Cabello v. State, 471 So.2d 332 (Miss.1985); Billiot v. State, 454 So.2d 445 (Miss. 1984), cert. den. ___ U.S. ___, 84 L.Ed.2d 369, reh. den. 85 L.Ed.2d 154 (1985); Pruett v. State, 431 So.2d 1101 (Miss.1983), cert den. 464 U.s. 865 (Miss. 1984); Gilliard v. State, 428 So.2d 576(Miss. 1983); Ramseur v. State, 368 So.2d 842 (Miss. 1979); Johnson v.State, 340 So.2d 738 (Miss. 1976) Capler v. City of Greenville, 207 So.2d339 (Miss. 1968), cert. den. 392 U.S. 941 (1969); Allegrezza v. State, 240Miss. 382, 120 So.2d 780 (Miss. 1960); Seals v. State, 208 Miss. 236, 44So.2d 61 (1950); Sullivan v.

State, 155 Miss. 629, 125 So. 115 (1929). We would point out that the only one of these cases touching upon Witherspoon error was Pruett. It involved a juror being left on the jury after stating he was opposed to the death penalty and then voting for a death sentence. A harmless error analysis was used by the court below in the decision of this case.

Finally there is only the ruling in Davis to support the position that the erroneous exclusion of a juror in the context of death qualification is not susceptible to a harmless error analysis. This question should not be subjected to a per se rule.

This Court has most recently spoken on the question of the applicability of the harmless error rule to constitutional errors in Rose v. Clark, ___ U.S.___, 46 CCH S.Ct Bull. P. B4382 (July 2, 1986). In Rose v. Clark, Justice Powell writing for the majority reaffimed the



validity of Chapman v. California, 386 U. S. 18 (1967), stating:

> We have emphasized, however, that while there are some errors to which Chapman does not apply, they are the exception and not the rule. United States v. Hasting, 461 U.S. at 509. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S., at ____; United States v. Hasting, supra at 508-509.
>
> 46 CCH S.Ct. Bull. at B4391.

We would summit that Witherspoon error is not one of those exceptions spoken of in Rose v. Clark. In Delaware v. Van Arsdall, 475 U.S.__,

89 L.Ed.2d 674, 106 S.Ct. ____ (1986), the Court, through Justice Rhenquist stated:

> Since Chapman, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. E.g., United States v. Hasting, supra (improper comment on defendant's silence at trial); Moore v.Illinois, 434 U.s. 220, 232 (1977) (admission of identification obtained in violation of right to counsel); Harrington v. California, supra (admission of nontestifying codefendant's statement). The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, United States v. Nobles, 422 U.S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R.Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.")

89 L.Ed.2d at 684-685.



The Court in Rose v. Clark, clearly set forth the type errors that could never be harmless error and reversal would be required without regard to the evidence. These were cases in which the errors "aborted the basic trial process, . . . or denied it altogether." 46 CCH S.Ct. Bull. at B4390, n.9. The examples cited by the Court in Rose v. Clark were the errors found in the following cases Payne v. Arkansas, 356 U.S. 560 (1958) (introduction of a coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (adjudication by biased judge); Vasquez v. Hillery, 474 U.S. ___, 106 S.Ct.617, 88 L.Ed.2d 598 (1986) (systematic exclusion of blacks from grand jury); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (directed verdict of conviction in criminal case). While the petitioner claimed in the court below that death scrupled jurors were being systematically

excluded from the jury, the exclusion of Juror Bounds did not violate any cross section standards as Witherspoon excludables do not constitute a distinctive group. Lockhart v. McCree, 476 U.S. ___, 106 S.Ct.1758, 90 L.Ed.2d 137 (1986). There being no recognized distinctive group this is not a case for the application of Batson v. Kentucky, 476 U.S. __, 90 L.Ed.2d 69, 106 S.Ct. ____ (1986). Here there was no abortion of the basic trial process, nor was there a denial of a basic trial altogether. What we have here is the simple question of whether or not a trial judge is allowed to correct an error he made in the selection of a capital jury. It would be ludicrous to hold that errors such as those here could never be subjected to a harmless error standard. At trial petitioner was represented by counsel, he was allowed to present evidence and arguments before an impartial judge and jury, therefore a harmless



error analysis is called for in this case. Rose v. Clark. We must remember that petitioner has never made the claim that the jury that tried, convicted and sentenced him was impartial. All petitioner claimed, below and here, is that there has been a technical violation of Witherspoon, in the exclusion of a juror he claims she stated she could vote for the death penalty. He would have this Court reach the result he wishes in the "manner of a catechism." 83L.Ed.2d at 852.

In United States v. Hastings, 461 U.S. 499 (1983), the Court reviewed its holding in Chapman. Chief Justice Burger, writing for the Court, stated:

> In holding that the harmless-error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error free, perfect trial, and that the Constitution does not guarantee such a trial. [citations

omitted] Chapman reflected the concern noted by Chief Justice Roger Traynor of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they" retrea[t] from their responsibility, becoming instead' impregnable citadels of technicality.'" R. Traynor , The Riddle of Harmless Error 14 (1970) (quoting Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 ABAJ 217, 222 (1925)).

Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, [citations omitted]. The goal, as Chief Justice Traynor has noted, is "to conserve judicial resources by enabling the judicial process of prejudicial error without becoming mired in harmless error." Traynor, supra at 81.

[Emphasis added, citations and footnotes omitted] 461 U.S. at 508-09.

In Davis v. Georgia, 429 U.S. 122 (1976), this Court, per curiam, reversed the death sentence imposed on Curfew Davis by the State of Georgia. The Court held:



> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings" (391 U.S.,at 522 n. 21, 20 L.Ed.2776, 88 S.Ct. 1770, 46 Ohio Ops 2d 368), he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.
>
> 50 L.Ed.2d at 341.

The majority did not hold that Witherspoon error was never susceptible to a harmless analysis. The mention of a per se rule and the failure to apply the harmless error test comes in the dissent from this summary disposal of the case. It is further interesting to note that the idea of a harmless error standard being applied to questions of juror qualification in death cases has recently been revived by Justice Stevens in his concurrence in Wainwright v. Witt, 83 L.Ed.2d 841 (1985). The approach he advocated to dispose of the

questions raised there concerning juror excusal was a harmless error approach. He stated:

> Given the gruesome facts of this case, see ante, at ____ U.S.____, 83 L.Ed.2d 845-846, and Colby's somewhat timorous responses, it is entirely possible that her appearance and demeanor persuaded trial counsel that he would prefer a more vigorous or less reluctant juror.[5] In view of that possibility, I am unable to conclude that the State's failure to make the kind of record required by Adams v. Texas constitutes an error so fundamental that it infects the validity of the death sentence in this case.
>
> [Emphasis added, footnote omitted]

83 L.Ed.2d at 860.

This is the type standard that should be applied in the case at bar and in cases of claimed errors in jury selection in death penalty cases. If this Court continues to read Davis, as creating a per se rule it stands guilty of "retrea[ting] from [its] responsibility, becoming instead [an] 'impregnable citadel[] of technicality.'" The



course already been condemned in Hastings. 461 U.S. at 509.

Petitioner is wrong when he says that the determination of whether to impose the death sentence is a "moral one" alone. Barclay v. Florida, 463 U.S. 939 (1983), cited by petitioner, clearly states that it is a"moral, factual and legal" determination. What petitioner is arguing is that he is entitled to have persons on his jury opposed to the death penalty, a issue that was laid to rest in Lockhart v. McCree. All petitioner is entitled to is an impartial jury. The Court held in Lockhart:

> We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial jury consist of nothing more than "jurors who will conscientiously apply the law and find the facts."
>
> [Emphasis Added] 90 L.Ed.2d at 151

Again Petitioner does not claim that the jury that convicted him and sentenced him to death

was impartial. His only claim is that one juror was excused after giving equivocal answers to questions concerning her beliefs about the death penalty. The trial court allowed this excusal by reconsidering an earlier ruling requiring the State to use peremptory challenges on jurors that were clearly excludable for cause under Witherspoon. This case cries out for the application of a harmless error analysis.

## CONCLUSION

For the above and foregoing reasons the decision of the Mississippi Supreme Court, holding the error here, if error at all, was harmless, should be affirmed.

Respectfully submitted,

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI



MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: Marvin L. White, Jr.
MARVIN L. WHITE, JR.

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

## CERTIFICATE

I, Marvin L. White, Jr., an Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **BRIEF FOR THE RESPONDENT** to the following:

This, the 14th day of July, 1986.

MARVIN L. WHITE, JR.